# Environmental Considerations in Planning

Ch 4 Mod 2 HO # 11

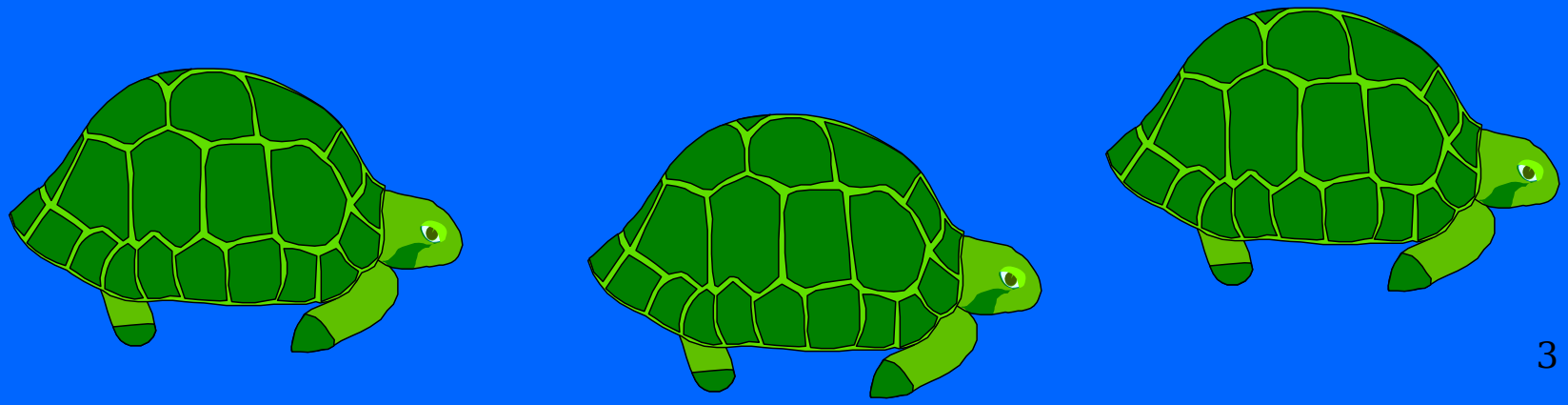
## Endangered Species A

# Objective of Class Session

- **Quick Review of ESA-- Emphasis on Section 7 Interagency Consultation Requirements.**
- **Note there is a NMFS/USFWS Consultation Manual.**
- **www.fws.gov**
  - **ECS3116 Interagency Consultation for Endangered Species**
    - **http://training.fws.gov**
- **www.nmfs.noaa.gov**

# PRIMARY OBJECTIVES OF THE LAW

- **Protecting threatened and endangered species.**
- **Restoring listed species to a secure status.**
- **What year passed into law?**



# Pertinent Sections of the ESA

- Section 4- Listing of Species, Designation of Critical Habitat, and Recovery Planning
- Section 6- Agreements and Funding for States
- **Section 7- Interagency Coordination and Consultation**
- Section 9 – Prohibits take of listed species
- Section 10- Scientific and Incidental Take Permitting and Habitat Conservation Plans

# Examples of Federally Listed Species

# Cheat Mountain salamander

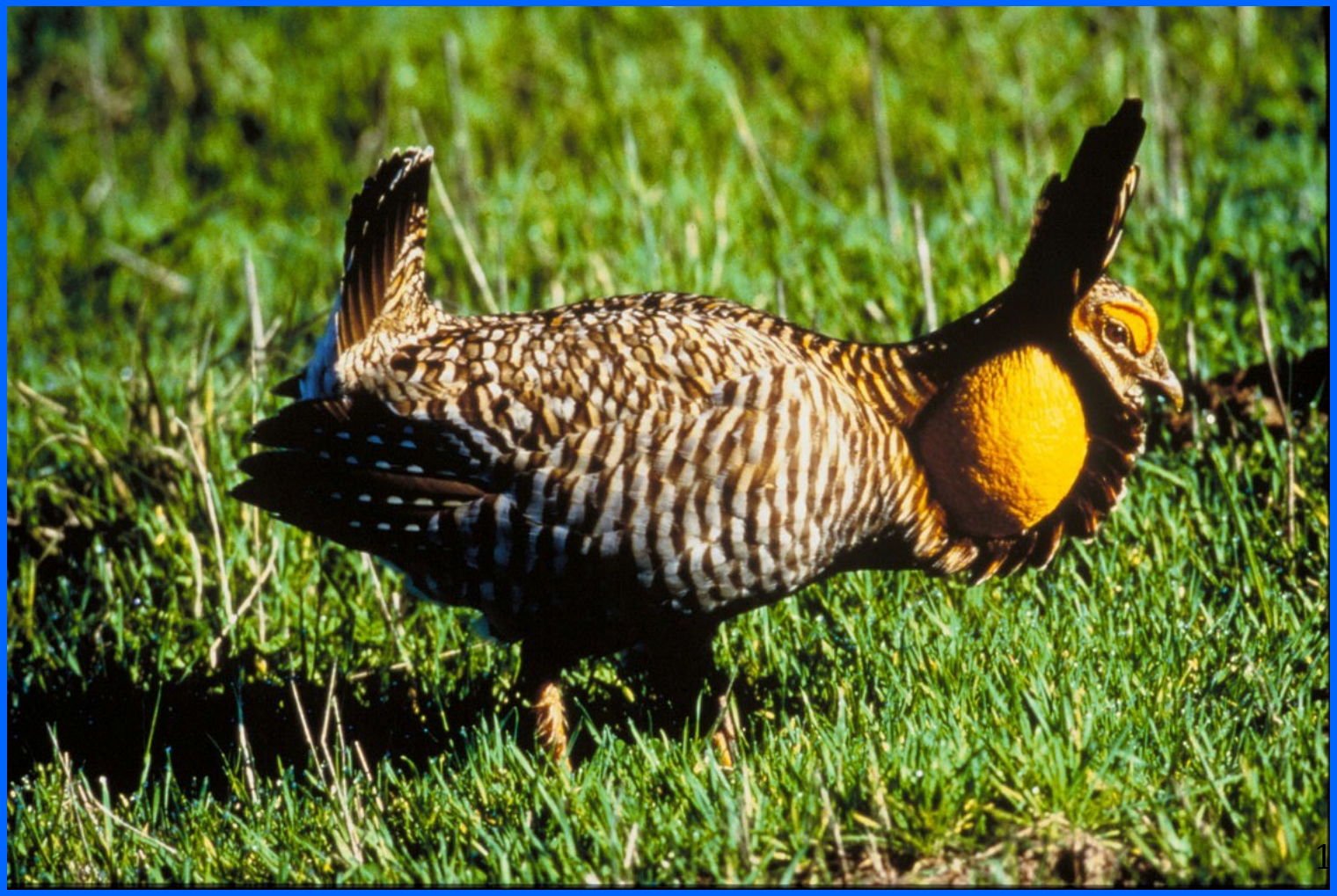
# Chinook salmon

# Fanshell

# Polar bear

# Loggerhead sea turtle

# Attwater’s prairie chicken



# Cumberland rosemary

# Pallid Sturgeon

# Eastern indigo snake

# Gray bat

# Swamp pink

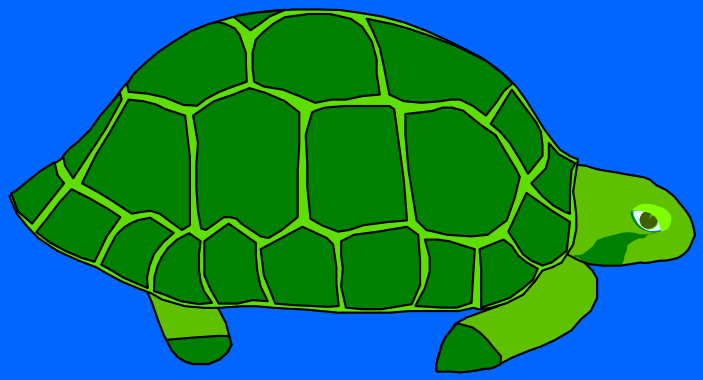
# Wood stork

# California tiger salamander

# Pink mucket (pearlymussel)

# Black-capped vireo

# How many federally listed species are there?



# Number of U.S. Listed Species per Calendar Year

| Calendar Year | Total Number |
|---|---|
| 1980 | 281 |
| 1985 | 384 |
| 1990 | 596 |
| 1995 | 962 |
| 2011 | 1375 |

Reasons???

# U.S. Listed Species Distribution

| Type | Total Number Listed (as of Aug. 2011) |
|---|---|
| Flowering plants | 761 |
| Fish | 140 |
| Birds | 92 |
| Mammals | 84 |
| Clams | 71 |

# Success Stories

Bald eagle
Delisted 2007

Peregrine falcon
Delisted 1999

American alligator
Delisted 1987

Tennessee purple coneflower
Delisted 2011

Lake Erie watersnake
Delisted 2011

# SOME DEFINITIONS:

- **Endangered---In danger of extinction within the foreseeable future throughout its range (e.g. Indiana bat, Alabama beach mouse).**

# SOME DEFINITIONS (cont.):

- **<u>Threatened</u>---Likely to become endangered within the foreseeable future throughout its range (e.g. piping plover, desert tortoise).**

# SOME DEFINITIONS (cont.)

- Critical habitat --- Services define what is critical habitat. Legally defined areas within the occupied range of the species essential to species conservation.

- Take ---To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
  - Violation of law carries criminal penalties.

# LEAD FEDERAL AGENCIES

- **U.S. Fish and Wildlife Service (Dept. of Interior)**

- **Terrestrial and freshwater species plus migratory birds**

- **National Marine Fisheries Service (Dept. of Commerce)**

- **Marine, estuarine, and anadromous species**

# PRIMARY ROLE OF THE FEDERAL LEAD AGENCIES (e.g. FWS)

- **Identification and listing of species and critical habitats.**
- **Administration of coordination & consultation provisions.**
- **Develop and implement recovery plans.**

# PRIMARY ROLE OF OTHER FEDERAL AGENCIES (e.g. Corps of Engineers)

- **Section 7 (a)(1)- Use agency authorities to further the overall purposes of the Act (e.g. Authorized Fish and Wildlife Purpose for our Reservoir Projects, Ecosystem Restoration projects).**

- ***Section 7(a)(2) of the ESA directs federal agencies to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species".**

# CONSULTATIONS

- **Required for major federal actions in accordance with ESA Section 7.**
- **Usually requested by the federal agency in charge of or proposing an action.**
- **Better sooner than later, in the initial planning phase.**
- **May be formal or informal.**

# INFORMAL CONSULTATION (purpose)

- Clarify whether species or critical habitat may be in the action area.
- Determine what effect the action may have on a species or critical habitat.
- Explore ways to modify action to reduce or remove adverse effects to species.
- Determine the need to enter into formal consultation.
- Explore the design or modification of action to benefit the species.

# INFORMAL CONSULTATION PROCESS

- Request species list or verification of list to FWS or NMFS (can be done in conjunction with FWCA process)
- If no species or critical habitat present- end consultation
- Informal discussions between an action agency and the FWS or NMFS concerning effects of the action on listed species and critical habitat.
- FWS or NMFS agree that action will not effect listed species or critical habitat- ESA compliance achieved.

# INFORMAL CONSULTATION DEFINITIONS

- **Not Likely to Adversely Effect--- Effects are expected to be Discountable, Insignificant, or completely Beneficial.**

- **Conservation Recommendations--- Measures not required by law but ways for USACE to conserve species under Section 7(a)(1).**

# INFORMAL CONSULTATION PROCESS (cont)

- If FWS or NMFS do not agree there will be no effect, agencies discuss modifying action to not likely adversely effect species or critical habitat.
- If agencies agree and action is modified, FWS or NMFS provide written concurrence and Conservation Recommendations- ESA compliance achieved.
- If agencies can not agree on modifications to not likely effect species or critical habitat then formal consultation becomes necessary.

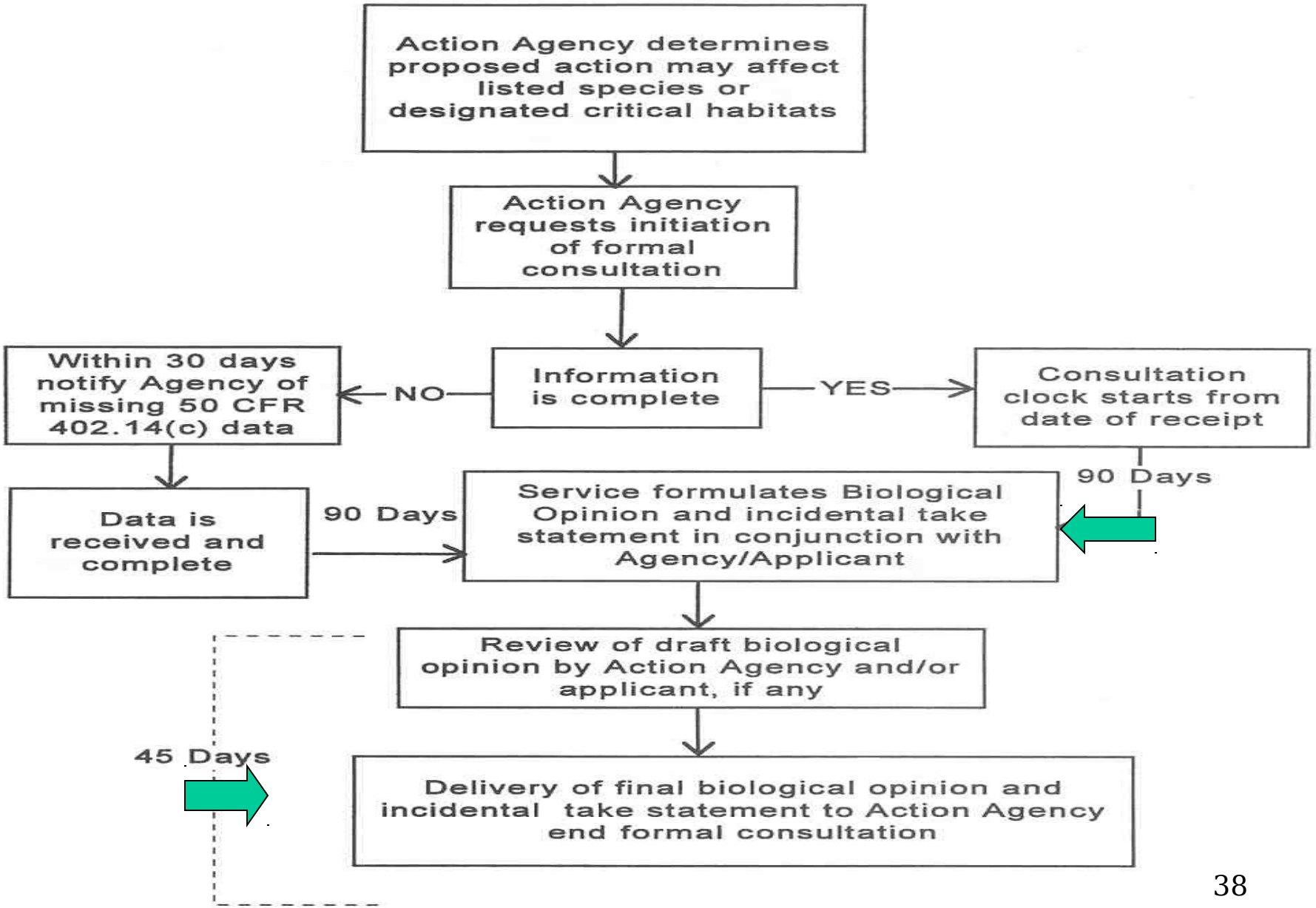
# FORMAL CONSULTATION (overview)

- A “likely to adversely affect” determination triggers formal consultation.
- FWS or NMFS can also request that the action agency enter into formal consultation.
- A “may effect” determination triggers the need for a biological assessment to be prepared by the action agency.
- USACE Findings are documented in Biological Assessment.

# FORMAL CONSULTATION (purpose)

- Identify nature and extent of the effects of the action on the species.
- Determines whether an action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat.
- Determines if take “incidental” to the purpose of the action will occur.
- Identify Conservation Recommendations.

**Figure 4-1. Formal consultation process.**


Action Agency determines proposed action may affect listed species or designated critical habitats
Action Agency requests initiation of formal consultation
Information is complete
NO
Within 30 days notify Agency of missing 50 CFR 402.14(c) data
YES
Consultation clock starts from date of receipt
90 Days
Data is received and complete
90 Days
Service formulates Biological Opinion and incidental take statement in conjunction with Agency/Applicant
Review of draft biological opinion by Action Agency and/or applicant, if any
45 Days
Delivery of final biological opinion and incidental take statement to Action Agency end formal consultation





See Ch 4 of ESA Consultation Handbook included on disk

# FORMAL CONSULTATION DEFINITIONS

- **Biological Assessment (BA) ---Document prepared to evaluate potential effects of the action on the listed species. (Should be part of a project's Feasibility Analysis).**

- **Biological Opinion (BO) ---Document prepared by the USFWS/NMFS in response to a BA.**
  - **Non-Jeopardy Opinion—project will not jeopardize the species.**
  - **Jeopardy Opinion—project will jeopardize species.**

# FORMAL CONSULTATION DEFINITIONS (cont)

- **"<u>may effect</u>" - when a proposed action may pose any effects on listed species or designated critical habitat.**

- **"<u>likely to adversely affect</u>" - if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial.**

- **<u>jeopardy</u> – the appropriate conclusion when the action agency or the Services identify situations where the proposed action is likely to jeopardize the proposed species or adversely modify the proposed critical habitat.**

# FORMAL CONSULTATION PROCESS

- **Formal consultation results in the FWS or NMFS issuing a Biological Opinion (after review of action agency's BA) that states whether a proposed action is likely to result in jeopardy or adverse modification of critical habitat or non-jeopardy opinion.**
- **If no jeopardy or adverse modification is expected, process is complete.**
  - **For non-jeopardy opinion: an incidental take statement is usually provided and Reasonable and Prudent Measures (RPM) identified to minimize incidental take.**

# INCIDENTAL TAKE

- **An incidental take statement (ITS) in a Biological Opinion exempts take from an ESA violation and discusses the magnitude of take, *reasonable and prudent measures (RPMs)(mandatory) to minimize the take.**

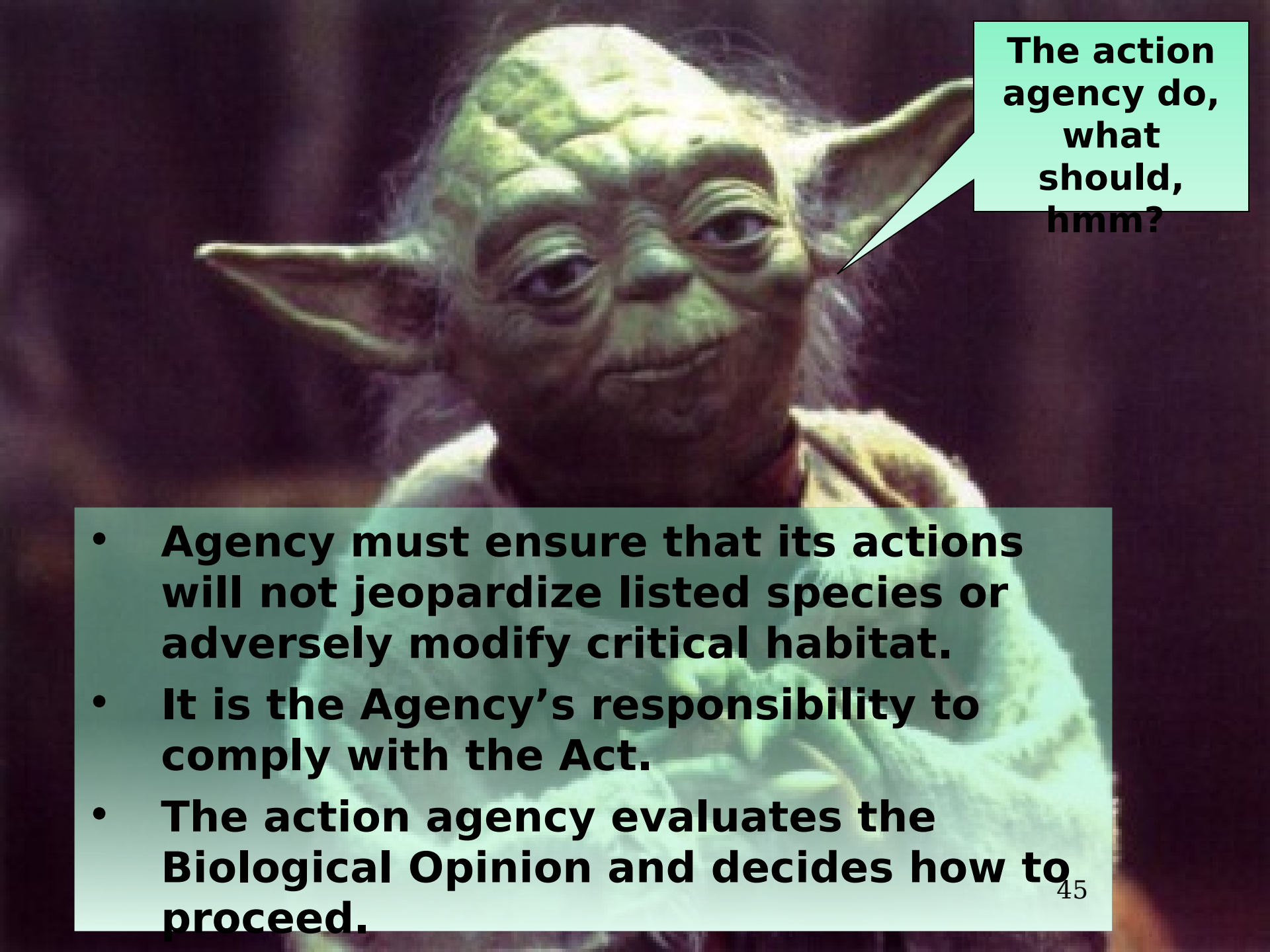
* **RPMs - actions the FWS believes necessary to minimize the impacts, i.e., amount or extent, of incidental take. An example: environmental restrictive construction windows.**

# FORMAL CONSULTATION PROCESS (cont.)

- If jeopardy is expected, the action agency can modify, with Reasonable and Prudent Alternatives (RPAs), its proposal to eliminate or reduce impacts below the threshold for jeopardy.

# FORMAL CONSULTATION DEFINITIONS (cont.)

- **Reasonable and Prudent Alternatives (RPAs) - recommended alternative actions identified during formal consultation that can be:**
  - **implemented consistent with purpose of the action,**
  - **and the scope of the Federal agency's legal authority and jurisdiction,**
  - **that are economically and technologically feasible, and**
  - **that would avoid jeopardizing the continued existence of listed species or the destruction or adverse modification of designated critical habitat.**




- **Agency must ensure that its actions will not jeopardize listed species or adversely modify critical habitat.**
- **It is the Agency's responsibility to comply with the Act.**
- **The action agency evaluates the Biological Opinion and decides how to proceed.**

# ACTION AGENCY CHOICES TO JEOPARDY OPINION W/RPAs

1. Adopt RPAs.
2. Not undertake project.
3. Reinitiate consultation based on modification of the action not previously considered.

# ACTION AGENCY CHOICES TO JEOPARDY OPINION W/RPAs (cont.)

4. Proceed w/action if it believes, upon review of BO, that such action satisfies Section 7. Note, w/o RPAs instituted, the protective provision of the ITS does not apply and agency may be liable for any take under the ESA. (Not recommended)
5. If action agency cannot comply with the requirements not to jeopardize, etc. then it may apply for an exemption.

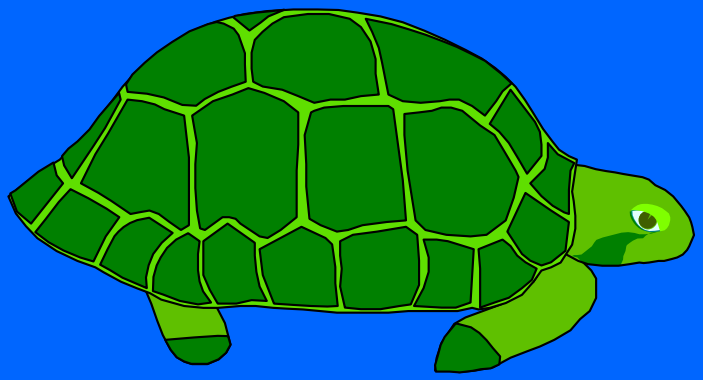
Whatever path is chosen, action agency must notify the Service of its final decision.

# Exemption Process
# "God Squad"

**Committee for Endangered Species:**

- **Cabinet level Agency Administrators**
- **Can provide exemptions to the ESA.**
- **Last Resort**

# Question: Are all Section 7 consultations controversial?

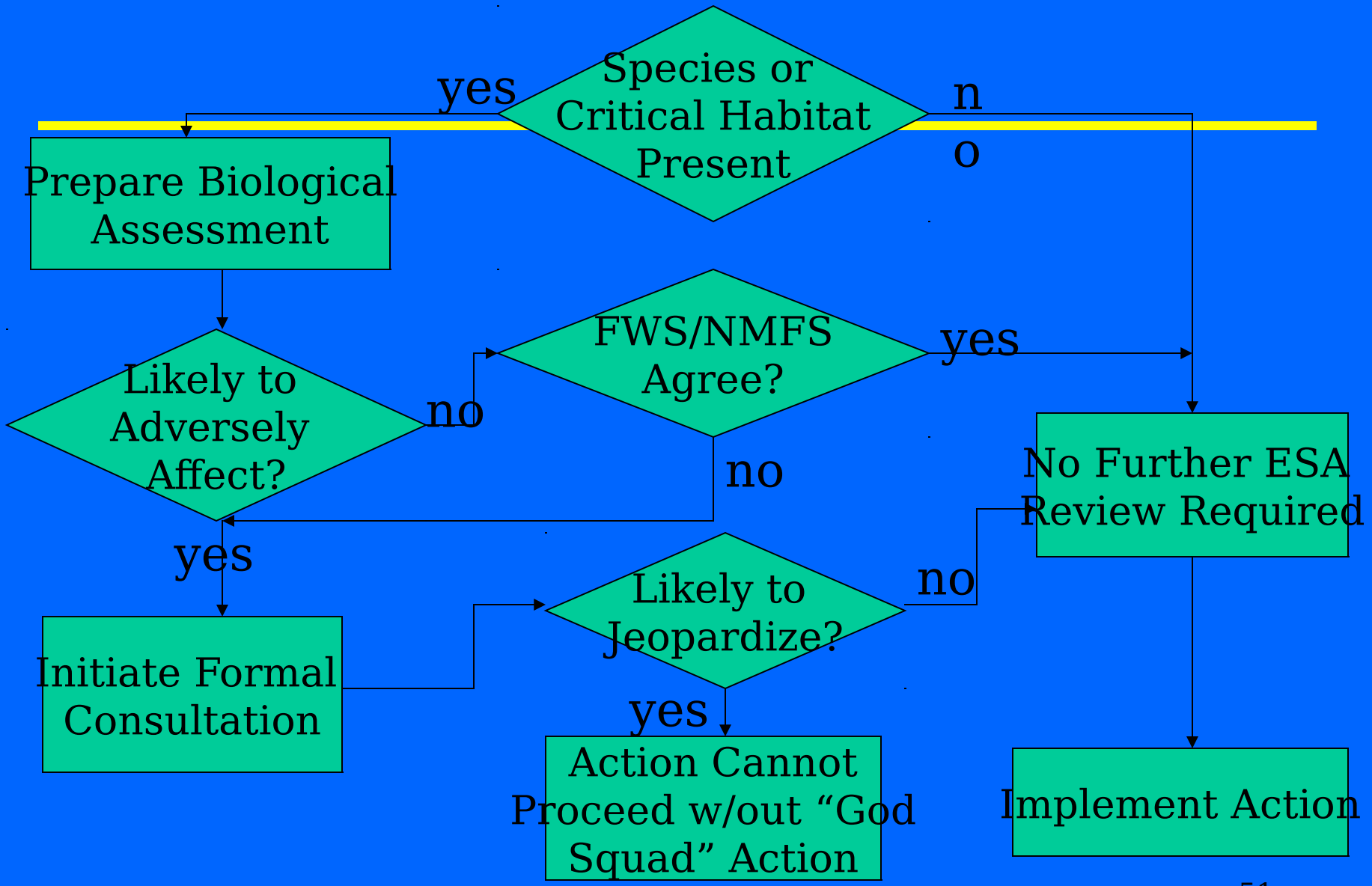


# Answer: No

**Approximately 40,000 Federal actions are reviewed annually.**

**Of the approximate 1,000 to 2,000 formal consultations per year, on average less than 1 percent result in a jeopardy or adverse modification finding (FWS Hdqtrs 2009).**

# Summary ESA Process Flowchart



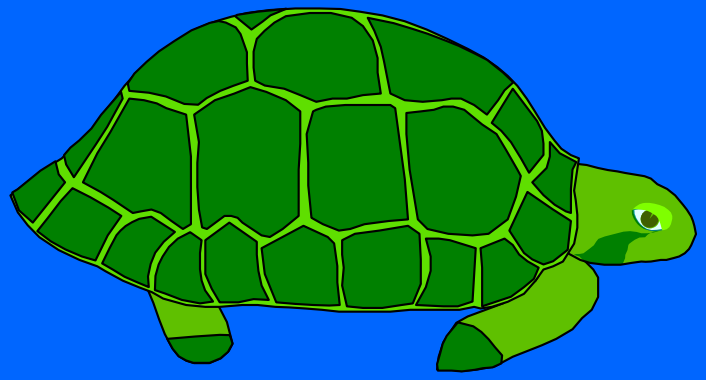
# Take Away Points

- Ensure  BA Addresses needs of USFWS/NMFS
- Provide any needed information punctually
- Document procedural compliance (formal letters and transmittals)
- Follow up FWS/NMFS on schedule
- Elevate problems quickly to Regional Office, if necessary, may help alleviate staffing problems

# some sage advice…

- Consult early and often
- Not intended to kill projects
- NMFS/FWS's role is to protect the species
- Ultimate responsibility lies with action agency
- Follow the process

# Class Exercise



# Barred & Spotted Owls